No. 99-1702

OCT 10 2000

In The

Supreme Court of The United States

TEXAS,

Petitioner,

v.

RAYMOND LEVI COBB,

Respondent.

On Writ Of Certiorari To The
Court of Criminal Appeals of Texas

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE NATIONAL LEGAL AID AND DEFENDER LAWYERS ASSOCIATION AS AMICI CURIAE IN SUPPORT OF THE RESPONDENT

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Questions Presented

I.

When an accused has been indicted for burglary, does his Sixth Amendment right to counsel attach, under *Maine v. Moulton*, 474 U.S. 159 (1985), and *McNeil v. Wisconsin*, 501 U.S. 171 (1991), to questioning about a factually related murder when his eventual capital murder conviction is not based on the previously charged burglary as a predicate felony?

II.

May an accused make an effective unilateral waiver of his Sixth Amendment right to counsel under *Michigan v. Jackson*, 475 U.S. 625 (1986), and *Patterson v. Illinois*, 487 U.S. 285 (1988), when his only previous "assertion" of that right to counsel consisted of accepting appointment of counsel following indictment on a different, but related, crime nearly a year and a half earlier?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

INTEREST OF AMICI CURIAE 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 5

ARGUMENT 7

I.
AT THE TIME OF HIS INTERROGATION, COBB'S SIXTH AMENDMENT RIGHT TO COUNSEL HAD ATTACHED AND PROTECTED HIM FROM UNCOUNSELED INTERROGATION ON THE BURGLARY OFFENSE.. ... 7

A. Cobb Asserted His *Jackson* Right to Counsel 7

B. No Exception to *Jackson* Applies in this Case. 8

II.
THE STATE SHOULD NOT BE ALLOWED TO THWART THE SIXTH AMENDMENT *JACKSON* RIGHT BY MANIPULATING THE CHARGED OFFENSE.. 10

A. The *Jackson* Right Would Become Meaningless If "Offense" Manipulation Were Unfettered. 10

B. Precedent Compels A Functional Approach. 11

III.
THE "CLOSELY RELATED" OFFENSE TEST APPLIED BY THE LOWER COURT ADEQUATELY PROTECTS THE ATTORNEY-CLIENT RELATIONSHIP AND ACCOMMODATES ALL LEGITIMATE STATE INTERESTS. 12

A. Where the Sovereign and the Criminal Transaction Are the Same, the Offense Is Always Closely Related. 13

B. A Flexible Approach to the "Closely Related" Test Better Protects Sixth Amendment Interests. ... 18

IV.
THE *BLOCKBURGER* "SAME OFFENSE" TEST IGNORES BOTH PRECEDENT AND VITAL DIFFERENCES BETWEEN THE RIGHT AGAINST INTERFERENCE IN THE ATTORNEY-CLIENT RELATIONSHIP AND THE PROHIBITION AGAINST DOUBLE JEOPARDY. 20

A. Precedent Precludes Equating the Fifth Amendment Double Jeopardy "Same Offense" Test with the Sixth Amendment "Offense Specific" Test. 20

B. The Defendant's Interest in the Double Jeopardy Context differs from the Defendant's Interest under the Sixth Amendment 23

C. Adopting a "Same Offense" Test Would Lead to Bizarre Results and Encourage Offense Manipulation. 26

CONCLUSION 30

TABLE OF AUTHORITIES
CASES

Blockburger v. United States, 284 U.S. 299 (1932) 20

Brewer v. Williams, 430 U.S. 387 (1977) ..... *passim*

Brown v. Ohio, 432 U.S. 161 (1977) 24

Cobb v. State, 2000 WL 275644 (Tex. Crim. App. Mar. 15, 2000) 5

Commonwealth v. Rainwater, 681 N.E. 2d 1219 (Mass. 1997) 13

Davis v. United States, 512 U.S. 452 (1994) 8

Edwards v. Arizona, 451 U.S. 477 (1981) 7, 10, 13

Grady v. Corbin, 495 U.S. 508 (1990) 26

Green v. United States, 355 U.S. 184 (1957) 24

Hendricks v. Vasquez, 974 F. 2d 1099 (9th Cir. 1992) 13

In Re Pack, 616 A. 2d 1006 (Pa. Super. 1992) 11, 12, 14

McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) .. 23

McNeil v. Wisconsin, 501 U.S. 171 (1991) ..... *passim*

Maine v. Moulton, 474 U.S. 159 (1985) ..... *passim*

Michigan v. Jackson, 475 U.S. 625 (1986) ..... *passim*

Michigan v. Harvey, 494 U.S. 344 (1990) 26

Minnick v. Mississippi, 498 U.S. 146 (1990) 9

Nix v. Williams, 467 U.S. 431 (1984) 29

Ornelas v. United States, 517 U.S. 690, (1996) 9

Patterson v. Illinois, 487 U.S. 285 (1988) 5, 8

People v. Clankie, 530 N.E. 2d 448 (Ill. 1988) 11, 12, 18

People v. Dotson, 574 N.E. 2d 143 (Ill. 1991) 13

People v. Hoskins, 523 N.E. 2d 80 (Ill. 1988) 12

People v. Spivey, 615 N.E. 2d 852 (Ill. 1993) 13

Slaughterhouse Cases, 83 U.S. (16 Wall.) 36 (1873) 21

State v. Frye, 897 S.W. 2d 324 (Tex. Crim. App. 1995) .. 10

State v. Tucker, 645 A. 2d 111 (N.J. 1994) 12

Taylor v. State, 726 So.2d 842 (Fla. App. 1997) 12

United States v. Arnold, 106 F. 3d 37 (3rd Cir. 1997) 19

United States v. Carpenter, 963 F. 2d 736 (5th Cir. 1992) 13, 18

United States v. Cooper, 949 F. 2d 737 (5th Cir. 1991) 13, 17, 18

United States v. Covarrubias, 179 F. 3d 1219 (9th Cir. 1999) 19

United States v. Doherty, 126 F. 3d 769 (6th Cir. 1997) 12, 19

United States v. Gouveia, 467 U.S. 180 (1984) 24, 25

United States v. Hines, 963 F. 2d 255 (9th Cir. 1992) 13

United States v. Kidd, 12 F. 3d 30, (4th Cir. 1993) 13, 19

United States v. Mitcheltree, 940 F. 2d 1329 (10th Cir. 1991) 19

Upton v. State,
853 S.W. 2d 548 (Tex. Crim. App. 1993) 12

Whittlesey v. State, 665 A. 2d 223 (Md. 1995) 12, 13

CONSTITUTIONAL PROVISIONS

U.S. CONST. AMEND. V ..... *passim*

U.S. CONST. AMEND. VI ..... *passim*

STATUTES

Me. Rev. Stat. Ann. 17-A§353 (1983) 22

Me. Rev. Stat. Ann. 17-A§401 (1983) 22

MISCELLANEOUS

ABA Model Rules of Professional Responsibility, 4.2 29

Ronald D. Rotunda, LEGAL ETHICS §32-4 29

INTEREST OF AMICI CURIAE[1]

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit corporation with a membership of more than 10,000 attorneys and 28,000 affiliate members in 50 states. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in its House of Delegates. NACDL was founded in 1958 to promote study in the field of criminal law; to advance knowledge of the law in the area of criminal practice; and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. NACDL seeks to defend individual liberties guaranteed by the Bill of Rights and has a keen interest in ensuring that the administration of justice is handled in a proper and fair manner.

The National Legal Aid and Defender Association (NLADA), is a private, non-profit membership organization, founded in 1911. Its membership is comprised of approximately 3,000 offices that provide legal services to poor people, including the majority of public defender offices, coordinated assigned counsel systems and legal services agencies around the nation. The NLADA's primary purpose is to assist in affording effective legal services to people unable to retain counsel, as the Fifth and Sixth Amendment right to counsel enables poor people in our criminal justice system to assert all of their other rights.

The primary interest of *amici* in this case is the potential impact on the integrity of the attorney-client relationship in prosecutions for factually related offenses. As this Court recognized in *Maine v. Moulton*, 474 U.S. 159, 176 (1985), criminal defendants, who are often uneducated and lack an awareness of

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[1] In accordance with Supreme Court Rule 37.6, undersigned counsel certifies that no counsel for any party authored, in whole or in part, any aspect of this brief. Further, no person or entity, other than amici curiae, made a monetary contribution to the preparation or submission of this brief.

the law, have a right to rely on counsel as a "medium" between the accused and the prosecution. A decision adopting Texas's position will undermine an accused's Sixth Amendment right to counsel by permitting questioning of the accused, without appointed counsel present, on matters that necessarily relate to the offense or offenses on which counsel was appointed to represent the accused. *Amici* concentrate on the merits of adhering to this Court's precedent, and that of all the lower federal and state courts, which support a "closely related offenses" test to protect the attorney-client relationship once the right to counsel has attached. Because the decision of the Texas Court of Criminal Appeals keeps faith with this Court's precedent in holding that since the Sixth Amendment right to counsel had attached on the burglary charge, thereby precluding any police interrogation of the defendant about the original offense or any "closely related offenses," *amici* respectfully submit this brief *amicus curiae* in support of Respondent, Raymond Levi Cobb.

STATEMENT OF THE CASE

In February 1994, the police in Walker County, Texas, arrested seventeen year-old Raymond Cobb for the December 27, 1993, burglary of the Owings' residence. Originally, Mr. Cobb denied involvement in the burglary, but in July 1994, he made a voluntary written statement admitting involvement in the burglary but denying any part in the disappearances of Maggie and Kori Ann Owings. Texas District Court Findings of Fact (hereinafter "Findings"), #14 at 2.

After this statement, on August 15, 1994, Mr. Cobb was indicted for the Owings burglary. At his arraignment, the 12th District Court for Walker County appointed attorney Hal Ridley to represent Mr. Cobb. Findings, #9 at 2. Initially, Ridley was hesitant to represent Cobb because of the connection between the burglary and the disappearance of the Owings, and because he was "coming off the trial of another capital case ... [and]

really didn't want to get involved in another one right behind that, if Mr. Cobb was in fact a suspect." S.F. Vol. 2 at 252.

Every time they questioned Mr. Cobb about the disappearances of the Owings, from August 1994 until November 12, 1995, the Walker County Sheriff's Department obtained permission from Ridley. S.F. Vol. 2, at 256. Ridley twice consented to the interrogations, "relying upon the representations of the law enforcement officers that [Cobb] was not a suspect in this capital murder case." Findings, # 15 at 3. Detective Debbie Funk, the officer first assigned to investigate the Owings disappearance, demonstrated that these representations by the Sheriff's department were false: She testified that local law enforcement always considered Cobb to be a suspect in the disappearances. S.F. Vol. 2 at 220.

Mr. Cobb was released on bond in the burglary case. He then moved to Odessa, Texas, to live with his father Charles Cobb. Findings, #17 at 3. Attorney Ridley told both Raymond and Charles Cobb to call him if the police ever contacted them again about the Owings case. Findings, #19 at 3. Instead, after speaking to Walker County Det. Judy James (who had replaced Det. Funk) Charles Cobb questioned his son, then called James again to report that Raymond had confessed. S.F. Vol. 1 at 313. Det. James then called the Odessa police department and directed them to arrest Raymond Cobb for the murders of Maggie and Kori Ann Owings. S.F. Vol. 1 at 321-322. The Odessa police complied, and then called Det. James again, and she gave them her permission to interrogate Cobb. S.F. Vol. 1, at 325.

On several previous occasions, Detective James had discussed the Owings disappearance case with Cobb's attorney, Ridley. Indeed, as recently as September 13, 1995, she asked Ridley for his permission to interrogate Cobb about the disappearances. S.F. Vol. 1, at 213. Nevertheless, Detective James did not inform Ridley that Cobb was re-arrested, nor did she inform the Odessa investigators that Raymond Cobb already

had appointed counsel. S.F. Vol. 1, at 211-212, 330. In fact, Ridley testified that if he had been properly notified, he would have never allowed the interrogation:

Q: Mr. Ridley, if you had been contacted by [prosecutor] David Weeks or Judy James at 2:39 in the morning and informed by them that your client, Raymond Cobb, was under arrest for capital murder, would you have allowed law enforcement personnel to interview Raymond Cobb?

A: Not in a million years.

* * *

Q: Would you have allowed him to consent to a search of his residence?

A: Consent – I would have told him not to say anything, or do anything, or sign anything. S.F. Vol. 2 at 267.

At 3 o'clock in the morning on November 12, 1995, the Odessa police began questioning Cobb. S.F. Vol. 1, at 329. At 5:00 a.m., Harold Thomas of the Odessa Police Department obtained an incriminating statement from Cobb. S.F. Vol. 1, at 346-347. After he was arrested and charged with capital murder, Cobb was flown to Walker County, where the police had him lead them to the Owings' burial site. Findings, #18 at 3.

Only after these events did the Walker County District Attorney contact attorney Ridley. The District Attorney told Ridley that his client had been arrested in Odessa, interrogated, brought before a magistrate, and ultimately led the police on a search for evidence. Findings, #18 at 3. The Sheriff's department subsequently called attorney Ridley to obtain his permission for the second grave-site visit and to request that Ridley visit Cobb. Thereafter, Ridley was appointed as counsel for Cobb on the capital murder charges. S.F. Vol. 2, at 261- 263.

Raymond Cobb was ultimately indicted for two capital offenses in a single indictment: Murder of two people in the same transaction, and murder in the course of burglary. Appendix A. The trial court denied Cobb's Motion to Suppress the Confession. Dist. Ct. Findings of Fact at 1. At the suppression hearing, Cobb's counsel pointed out the overlap between the "burglary," for which Cobb was represented at the time of the interrogation, and the "murder in the course of burglary" count. The prosecution *thereafter* abandoned the count that charged murder in the course of burglary, and proceeded only on count one of the indictment. S.F. Vol. 2 at 286-287. Cobb was found guilty of killing two people in the same criminal transaction and sentenced to death.

The Texas Court of Criminal Appeals reversed Cobb's conviction, holding that the Sixth Amendment right to counsel had the charge of capital murder charge because it was "factually interwoven with the burglary." *Cobb* v. *State*, No. 72,807, 2000 WL 275644, *13 (Tex. Crim. App. Mar. 15, 2000)(en banc).

SUMMARY OF ARGUMENT

I. The Sixth Amendment "guarantees the accused, at least after the initiation of formal charges, the right to rely on counsel as a 'medium' between him and the State." *Maine v. Moulton*, 474 U.S. 159, 176 (1985). To safeguard the defendant's ability to rely upon counsel, this Court prohibited police-initiated interrogation of defendants who invoke the right to an attorney at their arraignment. *Michigan v. Jackson*, 475 U.S. 625 (1986). Because Cobb had "accepted by appointment, a lawyer to represent him at the time he was questioned by authorities," *Patterson v. Illinois*, 487 U.S. 285, 290 n.3, he had asserted his right to counsel under *Jackson*. That months had passed since Cobb's assertion of his right to counsel is irrelevant, as is the fact that Cobb's counsel had on two prior occasions permitted interrogation in his absence.

II. Although the Sixth Amendment right protected by *Jackson* is "offense specific," the state cannot thwart that right by manipulation of the charged offense. A reading of "offense specific" that completely ignores the relationship between two closely related offenses would allow the state to circumvent the Sixth Amendment merely by charging a defendant with additional related crimes. This Court's precedents mandate an approach to "offense specific"that is sensitive to Sixth Amendment values rather than one focused on a comparison of the elements of charged and uncharged offenses. *Brewer v. Williams*, 430 U.S. 387 (1977); *Maine v. Moulton*, 474 U.S. 159 (1985).

III. *Every* lower court to address this issue since *Jackson* has recognized that a defendant's assertion of his Sixth Amendment rights with respect to a charged offense protects him against interrogation concerning closely related offenses. Moreover, although lower courts have varied slightly in their application of the "closely related" test, in *every* case where the transaction and sovereign are the same, courts have been unanimous in condemning uncounseled, police-initiated interrogation as an unjustifiable interference with the attached attorney-client relationship. Examined from either the perspective of the client or that of the lawyer, a same sovereign/same transaction rule provides the minimum protection of the relationship that is consistent with the purposes of the Sixth Amendment.

IV. Texas, and its supporting *amici*, urge this Court to adopt the double jeopardy "same offense" test for Sixth Amendment violations. Equating the Fifth Amendment double jeopardy clause's "same offense" test with the "offense specific" scope of Sixth Amendment rights cannot be reconciled with either the language of the two clauses or with this Court's decisions in *Brewer v. Williams*, 430 U.S. 387 (1977) and *Maine v. Moulton*, 474 U.S. 159 (1985). Moreover, vital differences in the competing interests of the defendant and the state in the double jeopardy and right to counsel contexts preclude using double jeopardy's "same offense" rule to redefine the "offense specific" scope of

Jackson. Finally, adoption of the proposed "same offense" test would lead to bizarre results and encourage offense manipulation aimed at thwarting an existing attorney-client relationship.

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ARGUMENT

I.
AT THE TIME OF HIS INTERROGATION, COBB'S SIXTH AMENDMENT RIGHT TO COUNSEL HAD ATTACHED AND PROTECTED HIM FROM UNCOUNSELED INTERROGATION ON THE BURGLARY OFFENSE..

The Sixth Amendment "guarantees the accused, at least after the initiation of formal charges, the right to rely on counsel as a 'medium' between him and the State." *Maine v. Moulton*, 474 U.S. 159, 176 (1985). The rule established in *Michigan v. Jackson*, 475 U.S. 625 (1986), is one important aspect of this guarantee.

A. Cobb Asserted His *Jackson* Right to Counsel.

To safeguard the defendant's ability to rely upon counsel, this Court extended the protection of *Edwards v. Arizona*, 451 U.S. 477 (1981) to defendants who request an attorney at their arraignment. *Edwards* set forth a per se rule that forbids interrogation of a person in custody who has requested the help of a lawyer. Although *Edwards* flows from the Fifth Amendment right to counsel at custodial interrogations, *Jackson* held that "the Sixth Amendment right to counsel at post-arraignment interrogation requires at least as much protection as the Fifth Amendment right to counsel at any custodial interrogation," *Jackson*, 475 U.S. at 632. Thus, requests for counsel made during arraignments are subject to the same bright line rule.

The *Jackson* prohibition against uncounseled interrogation is not triggered by indictment or arraignment alone, but by the assertion or invocation of the Sixth Amendment right to counsel.

Patterson v. Illinois, 487 U.S. 285 (1988). In *Patterson*, this Court found it "significant that [Patterson] had not retained, or accepted by appointment, a lawyer to represent him at the time he was questioned by authorities." *Id.* at 290 n.3. Cobb, however, *had* "accepted by appointment" a lawyer to represent him. By the time he was interrogated, Cobb had both met with his lawyer and appeared with his lawyer in court. Texas's claim that these actions were inadequate evidence of Cobb's choice to rely upon counsel thus ignores *Patterson*. The language in *Patterson* is not an accident. *McNeil v. Wisconsin* similarly infers that the defendant invoked his Sixth Amendment right on an armed robbery charge from the fact that "an attorney from the Wisconsin Public Defender's office represented [him] at [an] initial appearance." 501 U.S. 171, 173 (1991).

Any finer parsing of the precise sequence of events leading up to the appointment of counsel at an arraignment would have ridiculous consequences. Surely a defendant cannot be deprived of *Jackson*'s protections by the happenstance that a diligent magistrate offers him counsel before he can "ask" for it; surely a defendant should not have to say "I do not accept your offer of counsel but I do request that counsel be appointed to represent me." Additionally, in many cases, as here, no transcribed record of the arraignment exists, so that exactly what was said and in what order will not be certain; the only thing that will be clear is whether counsel was appointed.[2]

B. No Exception to *Jackson* Applies in this Case.

Just as the fact that a defendant has already consulted with counsel does not remove the Fifth Amendment bar to further

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[2] Petitioner's citation of *Davis v. United States*, 512 U.S. 452 (1994) is inapposite. *Davis* holds that a defendant's assertion of his right to counsel must be sufficiently clear and unambiguous "that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." *Id.* at 459. A *Jackson* assertion occurs before a magistrate or judge; if the magistrate appoints counsel, the obligations of the police are clear.

interrogation, *Minnick v. Mississippi*, 498 U.S. 146, 153 (1990), the fact that months had passed since Cobb's assertion of his right to counsel is irrelevant. Similarly, that counsel in this case had twice permitted interrogation in his absence in no way waives Cobb's rights under *Jackson*. Counsel described his own reasoning as follows: He had previously agreed to Cobb's interrogation outside his presence because the police had assured him that his client was not a suspect in the homicide. Counsel unequivocally stated, however, that he would not "in a million years" have agreed to the interrogation in dispute because by then, the police had information that Cobb had made admissions to his own father concerning the homicide. This strategy is undoubtedly idiosyncratic, and perhaps questionable, but the vagaries of how counsel chooses to guide his client does not deprive the client of his right to that guidance.

Nor were the police actually confused about the scope of counsel's earlier permission to interrogate Cobb. The contemporaneous behavior of the police reveals that they did not think that counsel's agreement to interrogation in his absence on one occasion constituted standing permission; if they had, they would not have sought permission *twice* prior to the third and critical interrogation, at which they were prepared to confront Cobb with the admissions he had made to his father. It appears that they failed to seek permission the third time because they assumed and feared – rightly, as attorney Ridley subsequently testified – that he would *not* acquiesce under the new circumstances. This inference is bolstered by the fact that *after* they had confronted Cobb with his admissions and obtained a confession, they *once again* sought counsel's permission for an interview with his client. Finally, the state court found that counsel's prior agreement did not constitute continuing permission, and deference should be given to that finding, both because of its factual nature and because state courts have familiarity with local patterns of interactions between the police and members of the defense bar. *Cf. Ornelas v. United States*, 517 U.S. 690, 699 (1996) ("[A] reviewing court should take care both to review findings of historical fact only for clear error and to

give due weight to inferences drawn from those facts by resident judges and local law enforcement officers.")

Thus, *Jackson* clearly protected Cobb from police-initiated, uncounseled interrogation related to the burglary charge at the time police obtained his confession.

II.
THE STATE SHOULD NOT BE ALLOWED TO THWART THE SIXTH AMENDMENT *JACKSON* RIGHT BY MANIPULATING THE CHARGED OFFENSE..

Unlike *Edwards*, *Jackson* is "offense specific," *McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991); "[i]t cannot be invoked once for all future prosecutions, for it does not attach until a prosecution is commenced." *Id.* This distinguishing limitation stems from the purpose of the Sixth Amendment guarantee, which is to "protec[t] the unaided layman at critical confrontations with his expert adversary, the government, after "the adverse positions of the government and defendant have solidified with respect to a particular offense." *Id.* at 177-78 (internal quotation marks and citation omitted). That the *Jackson* right is "offense specific," however, does not and cannot mean that the state is free to interfere with an attached, asserted attorney-client relationship simply because it has manipulated the "offense" in some superficial way.

A. The *Jackson* Right Would Become Meaningless If "Offense" Manipulation Were Unfettered.

At the extreme, both parties and all *amici* agree that the state cannot simply dismiss the indictment containing the charge for which the defendant is represented by counsel, question the defendant, and then file a new indictment. Nevertheless, such manipulation has been attempted, albeit unsuccessfully. *State v. Frye*, 897 S.W.2d 324 (Tex. Crim. App. 1995). Other purportedly literal readings of "offense specific" are equally implausible. Surely if a defendant obtains representation for a particular

burglary, which the indictment alleges occurred on one date, the state cannot interrogate that defendant, learn that the burglary actually occurred on another date, then drop the initial indictment, re-indict the defendant for burglary alleging the corrected date, and use his uncounseled statements at trial. Again, such manipulation has been attempted, but without success. *People v. Clankie*, 530 N.E. 2d 456 (Ill. 1988). Similarly, a reading of "offense specific" that completely ignores the relationship between two closely related offenses, such as theft and burglary, "would allow the [state] to circumvent the Sixth Amendment merely by charging a defendant with additional related crimes." *In Re Pack*, 616 A. 2d 1006 (Pa. Super. 1992), *allocatur denied*, 634 A. 2d 1117 (1993).

B. Precedent Compels A Functional Approach.

The decisions of this Court, not to mention common sense, mandate an approach to "offense specific" that is sensitive to Sixth Amendment values rather than one focused on dictionary definitions. *Brewer v. Williams*, 430 U.S. 387 (1977), holds that the commencement of legal proceedings against a defendant precludes police from deliberately eliciting incriminating statements from him in the absence of counsel. At the time Williams' statement was obtained, he had been arraigned and was represented on the charge of abducting a ten year old girl, *id.* at 390-91, but he was ultimately charged and convicted of her murder. *Id* at 389. The difference between the two charges, however, was neither dispositive nor even commented upon by this Court. Subsequently, in *Maine v. Moulton*, 474 U.S. 159 (1985), this Court *explicitly* distinguished the admissibility of "evidence pertaining to pending charges" from "evidence pertaining to charges as to which the Sixth Amendment right to counsel had not yet attached." *Id.* at 179-180. Importantly, this Court affirmed the reversal of Moulton's convictions not only for the theft for which he had been indicted at the time the evidence was elicited from him, but also for the factually interrelated burglary offense with which he was subsequently charged.

Finally, even Texas and the United States as *amicus* agree with Cobb that a reading of "offense specific" as "*identical* offense" is implausible. Thus the literal meaning of "offense specific" is not the dispute; the open question is how to best protect the attorney-client relationship without unduly infringing upon the state's legitimate interests.

III.
THE "CLOSELY RELATED" OFFENSE TEST APPLIED BY THE LOWER COURT ADEQUATELY PROTECTS THE ATTORNEY-CLIENT RELATIONSHIP AND ACCOMMODATES ALL LEGITIMATE STATE INTERESTS.

Every lower court to address this issue since *Jackson* has recognized that a defendant's assertion of his Sixth Amendment rights with respect to a charged offense protects him against interrogation concerning "closely related" or "very closely related" offenses. *See, e.g., United States v. Doherty*, 126 F. 3d 769, 776 (6th Cir. 1997) (collecting state and federal cases), *cert. denied*, 542 U.S. 917 (1998); *Whittlesey v. State*, 665 A. 2d 223 (Md. 1995) (same). Texas, and the supporting *amici*, conspicuously fail to cite a single lower court case that rejects this basic approach. Moreover, they cite no cases that apply the test to circumstances factually similar to this case without concluding that the offenses involved are in fact "closely related."

A. Where the Sovereign and the Criminal Transaction Are the Same, the Offense Is Always Closely Related.

In every case where the transaction and sovereign are the same, courts have been unanimous in condemning uncounseled, police-initiated interrogation as an unjustifiable interference with the attached attorney-client relationship. *See e.g., Taylor v. State*, 726 So. 842 (Fla. App. 1997); *People v. Clankie*, 530 N.E. 2d 448 (Ill. 1988); *People. v. Hoskins*, 523 N.E. 2d 80(Ill. 1988); *State v. Tucker*, 645 A. 2d 111 (N.J. 1994); *In Re Pack*, 616 A. 2d 1006 (Pa. Super. 1992), *allocatur denied*, 634 A. 2d1117 (1993); *Upton v. State*, 853 S.W. 2d 548 (Tex. Crim. App. 1993). *See also, United States v.*

Kidd, 12 F. 3d 30 (4th Cir. 1993); *Hendricks v. Vasquez*, 974 F.2d 1099 (9th Cir. 1992); *United States v. Carpenter*, 963 F.2d 736 (5th Cir. 1992); *United States v. Hines*, 963 F. 2d 255 (9th Cir. 1991); *United States v. Cooper*, 949 F.2d 737 (5th Cir. 1991); *People v. Spivey*, 615 N.E.2d 852 (Ill. 1993); *People v. Dotson*, 574 N.E.2d 143 (Ill. 1991); *Whittlesey v. State*, 665 A. 2d 223 (Md. 1994); *Commonwealth v. Rainwater*, 681 N.E. 2d 1219 (Mass. 1997). Examined from either the perspective of the client or that of the lawyer, a same sovereign/same transaction rule provides the minimum protection of the relationship that is consistent with the purposes of the Sixth Amendment.

In declining to apply the full sweep of the *Edwards/Roberson* rule to Sixth Amendment invocations, this Court has focused on what message or intention "can reasonably be construed" from a defendant's request at a judicial proceeding for the assistance of counsel. *McNeil v. Wisconsin*, 501 U.S. 171, 178 (1991). Because "[o]ne might be quite willing to speak to police without counsel present on many matters, but not the matter under prosecution," this Court declined to construe an arraignment request for counsel as a conclusive indication that the defendant "desire[s] to deal with police only through counsel"on all matters. *Id.* Thus, the Court in *McNeil* rightly surmises that a defendant's arraignment invocation is "offense specific," meaning only that the crime about which the state wishes to question him is unlikely to be *totally immaterial* to the defendant's determination of whether he needs the guiding hand of counsel. To take an easy example, in the course of deciding to request counsel at arraignment on charges of receiving stolen property and theft, a defendant is unlikely to even *consider* whether he wants or needs representation of counsel concerning a five-year-old federal tax evasion offense, let alone believe that his request for counsel covers such charges.

But noticing that the defendant's request and expectations are likely to be in some sense "offense specific" is only the first step. The question is *in what way* an arraignment request is "offense specific" - or, put differently, *which* offenses are

encompassed by the defendant's arraignment request. Focusing on the defendant requires answers that include *at least* those offenses that occurred within the same transaction, prosecuted by the same sovereign. It would be the very rare (and idiosyncratic) defendant who viewed the scope of the needed representation, or the scope of his request, more narrowly. At the very least, the defendant who obtains a lawyer to represent him on a receiving stolen property and theft charges will think he has a lawyer for the legal trouble he is in due to what happened "when I stole the stuff;" he is extremely unlikely to imagine that he is represented only on the theft charge, but not on a subsequent burglary charge arising out of the same incident. *In Re Pack*, 616 A. 2d 1006 (Pa. Super. 1992) (finding those offenses closely related). Indeed, such lay impressions would more commonly focus only on whether the transaction was the same, and not whether the sovereign was the same.

The focus on temporality is partially attributable to the typical defendant's lack of legal sophistication. The ability to focus on the exact elements of the charged offense is beyond the capacity of most criminal defendants, at least at the arraignment stage; in part, such limitations are the reason the defendant needs "the guiding hand of counsel." Nevertheless, whether the offense occurred during the "same transaction" is also significant to competent, legally-sophisticated defense counsel.

Attorneys appropriately perceive the attorney-client relationship as extending beyond the charged offense *at least* to other same transaction offenses, in part because of the frequency with which an initial indictment is superseded by one that charges additional temporally-related offenses. Moreover, even with respect to the first charge, counsel can hardly develop or effectively implement a coherent strategy if the police continue to interrogate the defendant on an ongoing basis about other crimes that may have occurred during the same incident. Plea bargaining practice, as well as the inevitable and substantial overlap in evidence, compels a competent attorney to guide (or at least attempt to guide) the client with respect to the potential

prosecution of *all* "same transaction" offenses. Such guidance, of course, is impossible if police are free to approach a client to elicit additional evidence without counsel's knowledge or consent.

A focus on the attorney's half of the attorney-client relationship may help explain some lower courts' insistence that only in cases in which the same sovereign (as well as the same transaction) is involved are offenses sufficiently "closely related" to invoke the protections of *Jackson*. Certainly, competent attorneys are well aware of the possibility of dual prosecution, and in many areas, appointment practices make it unlikely that the same attorney will serve as counsel in both federal and state prosecutions. On the other hand, close cooperation between federal and state public defenders for same transaction crimes is the norm, and the likelihood of overlapping evidence suggests that many defense attorneys, like many defendants, would view interrogation concerning the same transaction as circumvention of the existing attorney-client relationship, even if it were conducted by agents of a different sovereign.

The manner in which most states pursue their legitimate investigation interests reinforces the conclusion that, at least where the same sovereign is concerned, "offense specific" encompasses any crime committed during the same transaction as the crime for which the arraigned defendant has requested or secured counsel. We are not aware of any locale in which wholly separate investigation teams are assigned to different offenses arising from the same criminal transaction.[3] Indeed, the

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[3] The Brief for the State of Texas dramatically states that Cobb confessed to capital murder "[f]ifteen months later and 500 miles away. . . based on new information." *Id.* at 28. This statement is misleading insofar as it implies that the two *investigations* were separate. Cobb was interrogated by a geographically distant police department, but that department was acting upon instructions from the same department that investigated the burglary. Moreover, while the information was in one sense "new," it stemmed from the continuing investigative actions taken by the same department that initially

(continued...)

state coordinates the investigation of all same transaction offenses for much the same reasons that defense counsel treat such offenses as falling within the same attorney-client relationship: the frequency with which additional same transaction offenses are added to an initial indictment; plea bargaining practices which treat such crimes as a package; the overlap in evidence; and the need to develop an effective comprehensive strategy for trial. Thus, there is no reason to fear that any sovereign will be misled or confused by a same transaction/same sovereign interpretation of "offense specific."

This case provides a textbook example of the need to treat same transaction offenses as falling within the scope of the *Jackson* rule. Although the record contains no evidence concerning how Cobb viewed the attorney-client relationship, it is clear that the police were very much aware of the connection between the burglary and homicide offenses. In fact, they consistently treated the attorney-client relationship between attorney Ridley and Cobb as extending to all of the same transaction offenses. Texas now emphasizes that counsel described his "representation" of Cobb as limited to the pending burglary charge. Brief for the State of Texas at 2-3, 29. Certainly it is accurate that Ridley had only been *appointed* on the burglary prior to the confession, and it is also accurate that Ridley had expressed hesitation about taking on a capital case at that time. However, when Cobb was ultimately charged with capital murder Ridley was in fact appointed to represent him on that charge as well.

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[3](...continued)
investigated both the burglary and homicides. Finally, the excuse that the interrogating Odessa police force officers were "unaware" that Cobb was represented by counsel on a closely related offense, see Brief for the State of Texas at 4, is disingenuous. Officer Judy James of the Walker County police had instructed those officers to arrest Cobb, and before interrogating him, those Odessa officers sought her permission, which she granted. James, however, knew of Cobb's indictment and the appointment of counsel pursuant to it.

More important, whether Ridley had been appointed on the capital offense at the time of the interrogation and/or ultimately served as trial counsel is beside the point. Whether he hoped a capital trial would never materialize is also beside the point. From the time he was appointed on the burglary charge, Ridley behaved as though his attorney-client relationship with Cobb extended to all same transaction charges, and the behavior of the police reflects the same common-sense view of the scope of their attorney-client relationship. Thus, on the two earlier occasions *on which police sought Ridley's permission to interrogate Cobb*, the intended topic of the interrogation was Cobb's knowledge about and involvement in the homicides, not the burglary. Then, after Cobb confessed to the murders, Ridley was informed of these developments by police and asked to come down to the jail. Finally, after Cobb's confession, police sought permission from Ridley for Cobb to accompany them to the place he had buried the bodies, a matter clearly related to the homicide charges. Thus, it is abundantly clear that everyone involved knew the burglary and homicides were "closely related."

Under such circumstances, Cobb's assertion of his *Jackson* right on the burglary charge must be deemed to encompass the capital murder charge. No lower court that has addressed this issue disagrees. *United States v. Cooper*, 949 F.2d 737 (5th Cir. 1991), cited by the state as its sole example of a "principled application of the closely related test" that would deny relief to Cobb, is not to the contrary. The state's brief quotes one sentence of the *Cooper* opinion, which states that the crimes are not closely related because they concern "different conduct" but neglects to mention the underlying facts that prompted that conclusion: In *Cooper*, unlike this case, *both* the sovereign *and* the transaction were different.[4] In fact, the *Cooper* court explicitly

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[4] Cooper obtained representation on a state burglary charge and was questioned by federal agents concerning unlawful possession of an unregistered firearm. The possession charge did not stem from the same transaction as did the burglary charge; Cooper obtained the gun on a previous
(continued...)

distinguished the facts in, and approved the result of *People v. Clankie*, 530 N.E.2d 448 (1988), on the ground that "all the charges in *Clankie* were extremely closely related, involving the same crime of burglary, victim, residence, time span and sovereign." *Cooper*, 949 F.2d at 742-744.

B. A Flexible Approach to the "Closely Related" Test Better Protects Sixth Amendment Interests.

The same transaction/same sovereign interpretation of "closely related" offenses is consistent with the generalized expectations of clients, lawyers and police. It has the additional benefit that many courts have prior experience applying it in other contexts, such as capital and felony murder prosecutions, where "in the course of the same transaction" is an element of the offense. For these reasons, it offers clear guidance to all involved. Of course, "clear and unequivocal" guidelines are desirable "only when they guide sensibly and in a direction in which we are authorized to go." *McNeil v. Wisconsin* 501 U.S. 171, 181-82 (1991). While a narrow reading of the "closely related" offense rule offers clarity, the advantage of a more flexible approach is that it captures situations outside the norm where expectations of representation extend beyond same sovereign/same transaction offenses.

Although Texas characterizes the Ninth Circuit's approach as "complex," that court's approach employs nothing more than a familiar "totality of the circumstances" test. In fact, the opinion lists only a handful of relevant factors: the identity of persons involved (including the victim, if any), and the timing,

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[4](...continued)
occasion from a friend. The only link between the two offenses was the fact that the gun was discovered in Cooper's car when police stopped the car in an attempt to arrest Cooper for the burglary. This stop, however, did not take place on the same day as the burglary, and as it turned out, Cooper was not in the car at the time it was stopped and the gun was seized. *See also, U.S. v. Carpenter*, 963 F.2d 736 (5th Cir. 1992) (same).

motive, and location of the crimes. *United States v. Covarrubias*, 179 F. 3d 1219 (9th Cir. 1999). Other cases have also considered the existence and extent of police misconduct associated with the interrogation. *See e.g., United States v. Mitcheltree*, 940 F. 2d 1329, 1339, 1342-43 (10th Cir. 1991).

This slightly more detailed analysis has the virtue of covering cases which are, given their unique fact patterns, in fact "closely related," but which the same sovereign/same transaction test would exclude. For example, if an attorney is assigned to represent a defendant on several drug sales to a particular informant, in many cases it would be inconsistent with the expectations of all relevant parties to exclude from *Jackson's* protective umbrella the lone sale to that same informant that was not included in the indictment. *Cf. United States v. Kidd*, 12 F. 3d 30 (4th Cir. 1993) (where transaction involved same type of crime as charged offenses, but "involved a different purchaser-informant, occurred at a different time and took place in a different location," offenses were not closely related). Similarly, it would often be inconsistent with predictable expectations about the scope of representation to sever two assaults against the same party that occurred within a relatively brief time frame, even if the defendant left the victim's premises in the interim. *See United States v. Arnold*, 106 F. 3d 37, 41 (3rd Cir. 1997) (holding that, under all the circumstances, the attempted murder of a witness was "closely related" to the witness intimidation charge despite a temporal gap). Finally, and most persuasively, the same sovereign/same transaction test will be underinclusive where two sovereigns collude or at least cooperate. *United States v. Doherty*, 126 F. 3d 769 (6th Cir. 1997).

Whether this Court adopts the same sovereign/same transaction or a more sensitive version of the "closely related" offense rule, *the state must bear the burden* of showing that the offenses are *not* closely related when the defendant has asserted his Sixth Amendment right on a pending charge. Under either approach to the "closely related" offense test, that burden is

impossible to meet where, as here, the same transaction and the same sovereign are involved.

IV.
THE *BLOCKBURGER* "SAME OFFENSE" TEST IGNORES BOTH PRECEDENT AND VITAL DIFFERENCES BETWEEN THE RIGHT AGAINST INTERFERENCE IN THE ATTORNEY-CLIENT RELATIONSHIP AND THE PROHIBITION AGAINST DOUBLE JEOPARDY.

The Double Jeopardy Clause of the Fifth Amendment bars multiple punishment for, and multiple prosecutions of, the "same offense." For double jeopardy purposes, if "the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Blockburger v. United States*, 284 U.S. 299, 304 (1932). Texas and its supporting *amici* urge this Court to adopt this "same elements" test for Sixth Amendment violations. Brief for the State of Texas at 20; Brief for the United States at 13. Contrary to the assertions of both, this attempted transplant of double jeopardy jurisprudence has neither support in this Court's precedents nor any perceptible link to Sixth Amendment values.

A. Precedent Precludes Equating the Fifth Amendment Double Jeopardy "Same Offense" Test with the Sixth Amendment "Offense Specific" Test.

Before turning to precedent, it is instructive to begin with what comes before precedent: the plain language of the amendments. The Fifth Amendment's double jeopardy prohibition applies to the "same offense," whereas the Sixth Amendment's guarantee of the assistance of counsel extends to "criminal prosecutions." The fact that the Framers of the Bill of Rights chose different phrases - in consecutive amendments, no less - when they could have used the same phrase suggests that the two protections differ in the scope of their applications. "It

is too clear for understanding that the phraseology was adopted understandingly and with a purpose." *Cf. Slaughter House Cases*, 83 U.S. (16 Wall.) 36, 74 (1873)(comparing the phrase "citizen of the state" with "citizens of the United States").

Not only do the two clauses use different language, but it is plain from that language which provision sweeps more broadly. In comparing "same offense" to "criminal prosecution" it is apparent that the noun, "offense" is narrower than is "prosecution," and that the adjective "same" is uniquely restrictive, while "criminal" merely splits the courts' docket in two parts.

Far from ameliorating the plain meaning obstacles to this attempted equation of "same offense" and "criminal prosecution," the case law amplifies them. First, this supposed "same offense" test has a remarkable judicial history; the *only* judicial opinion that refers to it at all in the Sixth Amendment context does so disparagingly. *McNeil v. Wisconsin*, 501 U.S. 171, 187 (1991) (Stevens, J., dissenting) ("I trust [the] boundaries [of the offense specific limitation on *Jackson*] will not be patterned after the Court's double jeopardy jurisprudence. . . "). Even more telling, a Sixth Amendment "same offense" doctrine cannot be squared with this Court's decisions in either *Brewer v. Williams*, 430 U.S. 387 (1977) or *Maine v. Moulton*, 474 U.S. 159 (1985). In *Brewer*, this Court held that the commencement of legal proceedings against a defendant *who had been appointed counsel on kidnaping charges* required reversal of a conviction *on murder charges* due to the introduction into evidence of incriminating statements deliberately elicited from that defendant in the absence of counsel. Obviously, kidnaping is not the "same offense" as murder; kidnaping, unlike murder, requires asportation against the victim's will and murder, unlike kidnaping, requires the death of the victim. In contrast to the discordance of this result with the "same offense" test , either version of the "closely related" offense test presently employed by the lower courts is consistent with the result in *Brewer*.

Texas's claim that this Court's precedents establish the applicability of the "same offense" rule in the Sixth Amendment setting is equally impeached by *Moulton*. The Court affirmed the reversal of Moulton's theft convictions, for which he had been indicted prior to his uncounseled interrogation, a result that is consistent with the "same offense" test and with both versions of the "closely related" offense test. However, this Court also upheld the reversal of Moulton's conviction for the factually interrelated burglary offense with which he was subsequently charged, a result that cannot be squared with the state's "same offense" argument. Under Maine law, burglary is not the "same offense" as theft; where "theft," unlike "burglary," requires actually taking or exercising unauthorized control over the property of another, and "burglary," unlike theft requires entering a building. *Compare*, Me. Rev. Stat. Ann. 17-A§353 (1983) *with* Me. Rev. Stat. Ann. 17-A§401 (1983). In contrast, either variation of the "closely related" offense test set forth in Section III would compel reversal of the burglary offense as well as the theft offense.

Despite these inconsistencies, Texas and its *amici* insist that *Brewer* and *Moulton* can be reconciled with the "same offense" test. In the end, Texas and the United States are reduced to arguing that this Court failed to *notice* that neither the theft and burglary offenses in *Moulton*, nor the kidnaping and murder offenses in *Brewer*, constitute the "same offense." Brief for the State of Texas at 15, 20n.5; Brief for the United States at 22-23. Their efforts, however, are far from persuasive.

Brewer generated no fewer than three separate and vigorous dissents. Not one of these opinions suggested that Williams had no Sixth Amendment right to counsel on the murder charge because counsel had been secured only for the kidnaping charge. The opinions in *Moulton*, although not quite as contentious, *explicitly* focused on the distinction between the admissibility of "evidence pertaining to pending charges" and "evidence pertaining to charges *as to which the Sixth Amendment right to counsel had not yet attached.*" *Id.* at 179-180. Thus to claim that

members of this Court would have decided these cases differently but for the fact that none of them *recognized* the obvious fact that the pertinent offenses were not the "same offenses" goes beyond arrogance; it is fantasy. [5]

B. The Defendant's Interest in the Double Jeopardy Context differs from the Defendant's Interest under the Sixth Amendment.

According to the Solicitor General, "Now that the Court has adopted the same-elements test in interpreting the word 'offense' under the Fifth Amendment, it would be highly anomalous for the Court to conclude that the Sixth Amendment's offense-specific rule is to be applied not only by examining the elements of the charged and uncharged offenses, but also by asking whether the offenses are 'very closely related factually.'" Brief for the United States at 24. This statement starts with a mischaracterization of the double jeopardy bar; it is not "offense" that this Court's prior holdings have interpreted in that area but "*same* offense." Thus, what actually would be "highly anomalous" is for this Court to accept the Solicitor General's position that the word "same" is completely devoid of constitutional significance. *Cf. McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 414-15 (1819) ("It is, we think, impossible to compare the sentence which prohibits a state from laying 'imposts, or duties on imports or exports, except what may be *absolutely* necessary for executing its inspection laws,' with that which authorizes Congress 'to make all laws which shall be necessary and proper for carrying into execution' the powers of the general government, without feeling a conviction that the convention understood itself to change materially the meaning

[5] That *McNeil v. Wisconsin*, 501 U.S. 171 (1991)was decided after *Brewer* and *Moulton* cannot resolve the inconsistency between double jeopardy jurisprudence and Sixth Amendment precedent. In fact, *McNeil* quotes with approval *Moulton*'s distinction between offenses to which the Sixth Amendment has attached and those to which it has not. *McNeil* at 175-76.

of the word 'necessary' by prefixing the word 'absolutely.') (emphasis in original).

Furthermore, analogies from one Amendment to another are always risky because underlying differences in the interests the Amendment or Clause are designed to protect may render such analogies "inapt." *United States v. Gouveia*, 467 U.S. 180, 189-190 (1984). Relying on such differences, this Court in *Gouveia* declined the proffered analogy between speedy trial rights and the right to counsel. Similarly, in *McNeil v. Wisconsin*, 501 U.S. 171 (1991), this Court declined to apply Fifth Amendment right to counsel rules to Sixth Amendment right to counsel cases, again citing differences, albeit smaller ones, between the two rights. Here Texas and the United States propose an analogy that is far less valid, due to more substantial differences in the interests at stake.[6]

The double jeopardy clause serves two functions: It protects against successive prosecutions and it precludes multiple punishments for the same offense. A defendant's interest in the first protection is avoiding "embarrassment, expense, and ordeal ... anxiety and insecurity," caused by "repeated attempts" to convict him of an alleged offense. *Green v. United States*, 355 U.S. 184, 187 (1957). The second interest is to avoid "punishment that exceeds . . . legislative authority." *Brown v. Ohio*, 432 U.S. 161, 165 (1977). Both of these interests suggest a focus on the elements of the offenses at stake. To distinguish a "repeated attempt" from the prosecution of a new offense, consideration of how the offenses differ is necessary. Similarly, determining

[6] The briefs for Texas and the United States both rely heavily upon *McNeil*, and emphasize differences between the assertions of a Fifth and a Sixth Amendment right to counsel. Despite their differences, the two rights to counsel involve related, though not identical, values and interests, as well as a closely related course of doctrinal development. It is therefore more than ironic to see them boldly leap to transplant a standard from the Double Jeopardy Clause, a Clause that has neither a thematic nor a historical connection to this Court's Sixth Amendment jurisprudence.

what amount of punishment "exceeds" that which is authorized requires close examination of the statute and the underlying legislative intent.

The purposes of the Sixth Amendment right to counsel, and the corresponding interests protected by that right, are quite different. The Sixth Amendment is designed "to protect the unaided layman at critical confrontations with his adversary." *Gouveia*, 467 U.S. at 189. Consequently, the defendant has an interest in having an expert assist him in all dealings with a sophisticated and committed adversary. As discussed above, the "closely related" test, unlike the "same offense" rule, was formulated by lower courts to protect precisely that interest.

The contrast between the state's competing interest in the double jeopardy context and its very different interest in the Sixth Amendment context further underscores the inaptness of employing a double jeopardy standard to assess the meaning of *Jackson* invocations. The state has a unique interest in limiting the reach of the double jeopardy bar because its opportunity to *ever* prosecute a criminal offense is at stake. Thus, applying a "closely related" rule to double jeopardy cases would often force the state to choose between prompt prosecution of a serious offense and foregoing prosecutions of other (and sometimes more serious) offenses. The narrow words chosen for the double jeopardy clause by the Framers, ,"*same* offense," reflect the compelling nature of this interest. On the other hand, in the *Jackson* context, the state's interest in such a narrow rule is much weaker. Interpreting "offense specific" to mean "closely related" offense creates no bar to future prosecution for *any* offense. Indeed, the "closely related" offense rule does not even create an absolute bar to using the accused as a source of information; the accused on his own may choose to approach the police, or counsel may decide that speaking with the police is in the defendant's interest. The impact of a "closely related" offense rule in a Sixth Amendment context has one further limit: Even those statements within *Jackson's* protective scope may be used for impeachment. *Michigan v. Harvey*, 494 U.S. 344 (1990).

Even in the double jeopardy setting, where the language of the clause, the nature of the defendant's interest, and the strength of the state's competing interest *all* weigh more heavily toward a narrow test, the history of the relevant doctrine includes periods of experimentation with a broader test. *See e.g., Grady v. Corbin*, 495 U.S. 508 (1990) (adopting a "same-conduct" test). Considering all these relevant circumstances, inserting the peculiarly narrow double jeopardy standard into Sixth Amendment jurisprudence would be surprising. In contrast, affirming of the lower courts' sensitivity to language, history and context as expressed in the "closely related" offense test would not be surprising at all.

C. Adopting a "Same Offense" Test Would Lead to Bizarre Results and Encourage Offense Manipulation.

The fact that the "same offense" test would yield unpredictable results and encourage police and prosecutorial activity injurious to existing attorney-client relationships also argues against its adoption. Applying that test to the facts of this case provides one compelling example of its destructive effects, and makes it obvious that such a test invites similar effects in many other contexts.

In attempting to establish the separate nature of the burglary and capital murder offense, Texas obscures the degree to which the two offenses are inextricably linked, and sidesteps the fortuity of the circumstances that now permit it to argue in favor of the "same offense" test. The state's brief rather cryptically states that "Cobb was not convicted of capital murder based on the predicate felony of burglary; he was initially indicted for that offense also, but the government abandoned that part of the indictment before trial." Brief for the State of Texas at 28. In fact, Cobb was initially indicted *for the capital murder of Margaret Owings* under two theories: 1) Murder in the course of a burglary and 2) Murder in the course of the same transaction in which he killed Kori Owings. The evidence for these two offenses would have been not merely overlapping but identical. Moreover, the

state did not "abandon" the first count until *after* the suppression hearing, at which time counsel for Cobb pointed out the overlap between the "burglary" and "capital murder in the course of burglary" charges. This sequence of events does not support the "utmost good faith" that Texas protests.

True, the police did not manipulate the charges, see Brief for the State of Texas at 29.[7] Manipulation was left for the legally trained minds that took over after the police had finished with their work. But the state's next assertion goes beyond misleading protest all the way to mendacity. To claim, as their brief does, that "[The police] independently investigated offenses that, as it turned out when Cobb revealed the truth, were linked by a common circumstance," is simply untrue. The testimony of the officers involved in the case reveals that the investigations were linked from the start, and that it was their linkage--both in personnel and in subject matter--that eventually led Officer Judy James to speak to Cobb's father, who confronted Cobb, and then called James back to give her the information upon which Cobb's arrest was based.

The brief for the United States studiously avoids endorsing Texas's factual assertions. Indeed, it avoids discussing these inconvenient and troublesome facts at all. Moreover, neither Texas nor the United States acknowledges that their arguments for a "same offense" standard are supportable only because of the tragic *fortuity* that two victims were involved: Considering the entire course of conduct of the police in this case it is simply inconceivable that they would have behaved any differently if only one victim had been killed. But if only one victim had been involved, under the state's theory, the actions of the police would have been improper because capital murder in the course

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[7] The police did, however, manipulate Cobb's counsel. Detective Funk testified that she had always viewed Cobb as a suspect, but police told Ridley that Cobb was not a suspect. *After* he permitted the police to interrogate Cobb the second time, the sheriff told Ridley that he had always thought Cobb had committed the murder, but was (at that time) unable to prove it.

of a burglary is the "same offense" as burglary. Perhaps the state could have cured that defect as well, though the cure would have saved Cobb from a death sentence; if Cobb had been indicted only for capital murder in the course of a burglary, the state could have simply "abandoned" that indictment, and re-indicted him for noncapital murder. In such a circumstance, the conduct of the police would once again become consistent with their "same offense" construction of the Sixth Amendment.

Such hyper-technical analysis does not comport with what the police were thinking, what counsel was thinking or what Cobb was thinking regarding the scope of his invocation of the right to counsel. Nor are these bizarre consequences limited to the capital murder context. Under the double jeopardy "same offense" test, it would appear that, even if only *one sovereign* and *one transaction* were involved, the police could initiate an uncounseled interrogation of an arraigned defendant: 1) on burglary charges despite his representation on larceny charges (contrary to *Moulton*); 2) on murder charges despite his representation on kidnaping charges (contrary to *Brewer*); 3) on intentional murder charges (after the victim dies) despite his representation on aggravated assault charges *providing* that the state had alleged an aggravating factor of possession of a weapon; 4) on forcible rape charges despite his representation on statutory rape charges; 5) on possession of a specified quantity of a controlled substance despite his representation on charges of sale of an unspecified quantity of the same controlled substance; and 6) on robbery charges despite his representation on grand larceny charges.

These half-dozen examples suffice to demonstrate that the state's test would carve up the attorney-client relationship in ways that bear no correspondence to *anyone*'s understanding of

the right to the "guiding hand of counsel."[8] Moreover, even a quick perusal of the list in the preceding paragraph belies the state's assertion that "there is little or no strategic advantage to selective charging," Brief for the State of Texas at 25.

Clients with limited legal sophistication can hardly be expected to navigate these waters. They will not understand that, although they asked a judge for counsel once and the *same police* came back to question them again *about the same events*, they need to ask those same police for counsel again, after which the police will have to leave them alone. Attorneys will not know when particularly vulnerable clients are adequately protected by a request for counsel and when they are not; they will not know what they can do to further protect their clients or their trial strategy. Ironically, this potential for manipulation would not be an unmitigated blessing for the state; one of the most pronounced effects of a "same offense" test would be confusion, a confusion likely to be shared by the police. Police will not know when they should ignore representation regarding the same transaction. Presumably they will have to guess when they will uncover not just more evidence, but evidence that proves an additional offense with different elements. And when they are wrong, the state will wish to proceed on the original charge. But at that point, having violated the defendant's Sixth Amendment rights, the state may be asked to demonstrate either the independent source or the inevitable discovery of the evidence it plans to present. *Nix v. Williams*, 467 U.S. 431 (1984).

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[8] All attorneys are ethically barred from "knowingly communicating with a represented person about the subject matter of the representation without the consent of that person's lawyer." ABA Model Rule of Professional Responsibility, 4.2. Surely it would be a surprise to a civil defendant's lawyer that the plaintiff's attorney could approach his client regarding the accident in dispute to investigate additional causes of action. Rather, matters outside "the subject matter of the representation," are matters arising from different transactions. *See* Ronald D. Rotunda, LEGAL ETHICS §32-4 (listing examples).

To abandon precedent and reason, as Texas advocates, would reward and punish without respect to the constitutional values that undergird the Sixth Amendment.

CONCLUSION

Because the "same offense" test advocated by Texas is destructive of the attorney-client relationship, arbitrary with respect to the relationships it covers, and provides incentives for manipulation, it should be rejected. In contrast, the "closely-related" offense test embraced by the lower court is tailored to Sixth Amendment values and should not be abandoned for the illusion of symmetry. Therefore, the decision of the Court of Criminal Appeals of Texas should be affirmed.

Respectfully submitted,

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APPENDIX A

ASSIGNED TO THE 12TH JUDICIAL DISTRICT COURT
NO. 18,920
THE STATE OF TEXAS VS. RAYMOND LEVI COBB
CHARGE: SECTION §19.03. CAPITAL MURDER

IN THE NAME AND BY AUTHORITY OF THE STATE OF TEXAS:

THE GRAND JURY, for the County of Walker, State of Texas, duly selected, empanelled, sworn, charged and organized as such at the July Term, A.D. 1995, of the District Court for said County, upon their oaths present in and to said Court at said term that Raymond Levi Cobb, Defendant, on or about the 27th day of December, A.D. 1993, and before the presentment of this indictment, in the county and State aforesaid, did then and there

> intentionally and knowingly cause the death of an individual, namely, Margaret Owings, by stabbing her with a knife, and by manner and means unknown to the grand jury, and did then and there intentionally and knowingly cause the death of another individual, namely, Kori Rae Owings, by suffocation, and by manner and means unknown to the grand jury, and both murders were committed during the same criminal transaction,
>
> And the defendant did then and there intentionally cause the death of an individual, namely, Margaret Owings, by stabbing her with a knife, and by manner and means unknown to the grand jury, and the defendant was then and there in the course of committing and attempting to commit the offense of burglary of a building of Lindsey Owings, who was the owner of said building,

AGAINST THE PEACE AND DIGNITY OF THE STATE.

_____
Foreman of the Grand Jury